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Watts, Legh Richmond

Address of
President Legh R. Watts...
Richmond [Va.]

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ADDRESS

OF

PRESIDENT LEGH R. WATTS,
of Portsmouth

BEFORE THE

Virginia State Bar Association

AT THE

White Sulphur Springs

WEST VIRGINIA

August 4th, 5th and 6th, 1915

RICHMOND:

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Address of President Legh R. Watts, of Portsmouth.

"The Judicial Department—the keystone of our political fabric—the chief pillar upon which our National Government must rest."—*President Washington, September, 1789.*

Ladies—Gentlemen of the Virginia State Bar Association—
Friends:

You will recall that at our last annual meeting Mr. E. Hilton Jackson presented a preamble which, after reciting that the District of Columbia Bar Association proposed giving to the American Bar Association during its session in Washington, D. C., October 21, 1914, an excursion to Mt. Vernon, and that Judge James Keith, President of the Supreme Court of Appeals of Virginia, was to deliver an address of welcome on behalf of the Virginia Bar, expressed:

"The desire of this Association to take official part in the welcome to the American Bar Association upon its first official visit to this historic spot,"

and concluded with a resolution:

"That the incoming President be, and he hereby is, authorized and directed to appoint a committee of five within easy reach of Washington to assist in extending a welcome to the members of the American Bar upon the occasion in question on behalf of this Association."

The preamble and resolution were unanimously approved and adopted, and, as provided therein, Hon. R. Walton Moore, Fairfax, Mr. E. Hilton Jackson, Washington, Judge J. K. M. Norton, Alexandria, Judge L. L. Lewis, Richmond, and Mr. Robt. B. Tunstall, Norfolk, were appointed a committee, and to them the thanks of this Association are due, and are

hereby tendered, for arranging the details of the welcome and the complete and successful carrying out of the program as agreed upon.

On arriving at Mt. Vernon the members of the American Bar Association and the ladies and friends accompanying them were met at the wharf by your committee and escorted to the spot selected for the reception, the tree planting, and the ceremonies incident thereto.

The address of welcome was made by Ex-Governor A. J. Montague, who had, upon request, kindly consented to represent Judge Keith. To his cordial and eloquent words of greeting President Taft responded on behalf of the American Bar Association, paying a most beautiful tribute to the character and services of Washington. This concluded, President Taft planted near the tomb for and on behalf of the American Bar Association a "Memorial Oak," which will, in the years to come, sentinel the grave of Washington.

It is to be regretted that no notes were taken of these masterly addresses, so appropriate to the occasion and so abounding in suggestions, stirring patriotic thoughts, and inciting a deeper love for our country and its institutions.

The occasion was one of great dignity and marked solemnity. The weather was ideal—a perfect autumn afternoon, one in thorough keeping with the peaceful surroundings of the place and the hallowed memories and traditions which will forever attach to and cluster around the home and grave of Washington.

The presence and participation of Judge Taft in the ceremonies added much to both the pleasure and the interest of your committee. He has been an honored guest of our Association and has won and holds a large place in the hearts of its members.

We will always remember that when President of the United States he recognized the just claims of the South and appointed to the Supreme bench two of its most eminent jurists, lawyers always identified with the party opposed to that by which he was elected.

We love to recall that on the death of Chief Justice Fuller

he promoted to the exalted position thus made vacant Associate Justice Edward D. White, a Confederate veteran, first appointed Associate Justice by President Cleveland; and today the judicial robes and unspotted ermine of the great Marshall rest on the shoulders of one who wore the faded gray and wielded a stainless sword in defense of his native South. These appointments indicate a patriotism as broad as our country is wide, and a moral courage and determination to do the right, well befitting the chief executive of the world's greatest Republic.

Ex-President Taft's place in history is secure; he will rank as one of our wisest, most conservative and patriotic Presidents.

The one disappointing incident was the enforced absence of Judge Keith, who was detained at his home by sickness. He had, however, prepared his address, and it is published in the Report of the American Bar Association for 1914. I heartily commend it as worthy not only of your careful perusal, but your most earnest consideration.

While listening to Judge Taft's tribute to Washington, his exalted character, and the splendid services rendered his country, not only as the great soldier who achieved its independence, but more largely as the wise and far-seeing statesman who aided so materially in welding the thirteen sovereignties into "a more perfect union," I recalled that provision of our Constitution which provides that:

"At each annual meeting the President shall deliver an address upon some subject to be selected by himself, in which he shall make such suggestions as to the work of the Association as he may deem proper."

and at once determined to suggest to you, my brothers of the Virginia Bar, a recurrence to and advocacy of, the teachings of Washington, and to invoke your earnest effort and active influence in behalf of those great principles of government for which he stood and of which he was the determined advocate, for surely, during this period of domestic agitation and unrest, and of foreign war and international complications, we can render no higher service to our country.

The people of Virginia, and of the country, have largely looked to the Bar for conservative leadership, and never in all history has the need for wise and well-matured counsel been greater than at this time, when the propaganda of discontent is so active and the enemies of a constitutional democracy so reckless in their efforts to overthrow our present system of government.

The Constitution itself and the courts established thereunder are alike the subjects of the most violent and vicious attacks. The Convention of 1787—"the goodliest fellowship of law-givers whereof the world holds record"—was denounced by Chief Justice Clarke, of North Carolina, in his Cooper Union address January, 1914, as under the control of a "reactionary party—the champions of government of the many by the few," who "with sublime audacity, * * * taking advantage of the necessity for a stronger Union, shaped the Constitution of the United States," and "quietly, unostentatiously, but effectively, took control of the government."

In referring to this Convention and its great work, Judge Keith, in his address of welcome, writes:

"I am always pleased to remember that when * * * the people of these United States were seeking to write into the Constitution the result of that mighty struggle our wisest and most learned men could not do better than go back seven centuries to the meadow of Runnymede and ordain that henceforth 'no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' What a caveat was there to all reformers! What a light was thrown upon the pathway of true progress!"

This attack upon the influences controlling the Convention of 1787, presided over by George Washington, which gave to the country our marvelous Constitution, pronounced by Mr. Gladstone "the most wonderful work ever struck off at a given time by the brain and purpose of man," and the assault upon the character and judicial integrity of Chief Justice Marshall, are

due to and inspired by his opinion in the leading case of *Marbury v. Madison*, 1 Cranch, U. S. 136. He held, all the Associate Justices concurring:

"That an act of Congress repugnant to the Constitution cannot become a law";

and

"That the courts of the United States are bound to take notice of the Constitution."

Chief Justice Clarke, referring to this decision, said:

"The overwhelming preponderance of the judiciary in the Government was unexpectedly created in 1803 by a decision of the Supreme Court of the United States * * * when that body assumed the right to nullify and veto any act of Congress that they chose to hold unconstitutional. This astonishing declaration was made in the case of *Marbury v. Madison* by Chief Justice Marshall. The doctrine was shrewdly set forth in an *obiter dictum*, etc."

Continuing his criticism:

"This power, when assumed by the judges in *Marbury v. Madison*, was without a precedent in any other country. It had never been dreamed of before in any other country that the judges would assume governmental functions and negative the action of men who were entrusted with the law-making duties. It had been attempted only once in England, and then they very promptly hung the Chief Justice (Tressillon) and exiled his associates. * * * This is the law in England to this day. If the judges had attempted any such decision as our court made in *Marbury v. Madison*, in the *Dartmouth College* case, or in the *Income Tax* case, and similar cases, the law-making power would have at once vindicated its rights by the prompt removal of the judges."

The Judge does not, it is true, tell his hearers that Chief Justice Marshall and Chief Justice Fuller, who delivered the opinions so fiercely denounced, should have been "hung," and the Associate Justices concurring driven from the country; but the inference to be drawn is quite plain, and the probable effect, upon a mixed audience of dissatisfied people, anxious for any change, cannot be misunderstood.

He fails to note that in England there is no written Constitution and, therefore, the Parliament is supreme, while in the United States the power of Congress to enact laws is limited and well defined by a written Constitution. Besides, our Constitution was made and ordained, as stated in the preamble, by the "People" in their sovereign capacity, and not by the States. By it certain powers were vested in the government. We have, as has been often said, a government by the "People" and, though limited in its powers, the Constitution, within these powers, is the supreme law of the land, anything in the Constitution and laws of any state to the contrary notwithstanding.

It will be noted that the only way in which the Constitution can be changed, altered or amended is in the manner prescribed therein. Can it be, therefore, contended that the Congress, or a State Legislature, can amend, alter or modify the Constitution by their simple act? Can either Congress or a State Legislature pass any statute which will deprive, for instance, a citizen of the right "to a speedy and public trial by an impartial jury of his peers," as guaranteed by the Constitution and thus work a change or a modification in that instrument? Can the Constitution thus be nullified, and can a judge, who has solemnly sworn to support, maintain and defend the Constitution, hold such an act as "a law made in pursuance thereof"?

But for our purpose it is quite immaterial whether the Constitution, in express terms, gives to the Federal judiciary the power to pass upon and finally determine the constitutionality of legislation, both Federal and State, or whether this is an implied power. The conclusion reached by Marshall and the law as held by the court are in absolute harmony with the understanding of the States at the time their representatives in Convention assembled adopted the Constitution. The judiciary

was discussed, both in the Convention which adopted the Federal Constitution in 1787 and in the Conventions of the several States which afterward ratified it. In the former, Elbridge Gerry, of Massachusetts, called attention to the fact that in some of the states judges had "actually set aside laws as being against the Constitution"; and in discussing a legislative negative, Gouverneur Morris, of New York, said he was "more and more opposed to a negative, the proposal of it would disgust all the states. A law that ought to be negatived will be set aside in the judiciary department, and if that security fail, may be repealed by a national law."

In the Virginia Convention of 1788 this clause was carefully considered and a heated discussion followed. It was bitterly opposed by Patrick Henry, who insisted on the supreme authority of the state courts. He said, I consider,

"the Virginia Judiciary is one of the best barriers against the strides of power * * * * when I see the last barrier—the independency of the judges impaired, I am persuaded I see the prostration of all our rights."

To this, John Marshall replied, contending that there must be a final arbiter somewhere in all cases arising under the Constitution:

"Is it not necessary that the Federal Court should have cognizance of cases arising under the Constitution and laws of the United States? What is the service or purpose of a judiciary but to execute the laws in a peaceable manner? * * * * To what quarter will we look for protection from an infringement of the Constitution if we will not give the power to the Judiciary? There is no other body that can afford such protection."

And in the Pennsylvania Convention, James Wilson, afterwards appointed by Washington a Justice of the Supreme Court of the United States, said:

"Controversies may certainly arise under this Constitution and the laws of the United States, and is it not proper that there should be judges to decide them? * * * * If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void, for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law."

As a matter of fact, as well as of history, the Supreme Court had, before the decision in *Marbury v. Madison*, three times decided that in the opinion of the judges, certain acts of Congress were contrary to the Constitution, and, therefore, void, and in two of these cases Chief Justice Jay was present and concurred in the decision made.

In *United States v. Ferreira*, 13 How. 46, there is a footnote by Chief Justice Taney, inserted by order of the court:

"Since the foregoing opinion was delivered, the attention of the court has been drawn to the case of *U. S. v. Yale Todd*, which arose under the act of 1792, and was decided in the Supreme Court February 17, 1794. * * * * Chief Justice Jay and Justices Cushing, Wilson, Blair and Patterson were present at the decision. No opinion was filed stating the ground of the decision. Nor was any dissent from the judgment entered on the record. It would seem, therefore, to have been unanimous. * * * * The result of the opinion expressed by the judges of the Supreme Court of that day in the note to *Hayburn's* case, and in the case of *U. S. v. Todd*, is this:

"1. That the power proposed to be conferred on the Circuit Court of the United States by the act of 1792, was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional and could not lawfully be exercised by the courts."

Again in *Calder and Wife v. Bull and Wife*, 3 Dallas, U.S. 386, the validity of a law of Connecticut being under consideration. Justice Chase said:

"I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution or fundamental law of the state. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence."

And Judge Iredell, who had argued in the Superior Court of North Carolina the case of *Bayard and Wife v. Singleton*, hereinafter referred to, in delivering his opinion, said:

"In order, therefore, to guard against so great an evil, it has been the policy of all the American States which have individually framed their state constitutions since the Revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a state, violates these constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case."

In the State Courts the same rule of construction at that time, prevailed, and it was the Virginia Court of Appeals that first in this country, discussed the power of the courts to declare a legislative enactment unconstitutional, and, therefore, void. In *Commonwealth v. Caton and Others* (1782) 4 Call 5, Judge Edmund Pendleton, President of the Court, said:

"Chancellor Blair and the rest of the judges, were of

opinion that the court had power to declare any resolution or act of the legislature or of either branch of it, to be unconstitutional and void."

And Judge Wythe, concurring, said:

"Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the Constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further."

Brave and noble words from an independent, fearless and incorruptible judge—worthy the best traditions of the Virginia judiciary.

An Act of the General Assembly of Rhode Island, May, 1786, authorizing the emission of certain paper money, making the same legal tender, followed by a subsequent act, August, 1786, providing for the trial of offences against the first act and the procedure to be followed in prosecutions under the same, declared:

"That the said court, when so convened, shall proceed to the trial * * * * without any jury, by a majority of the judges present, according to the laws of the land, and to make adjudication and determination, and that three members be sufficient to constitute a court."

This was contested in the celebrated case of *Trevett v. Weeden*. Weeden, having declined to receive in payment of a butcher's bill one of the bills of credit emitted under the act referred to, was prosecuted, and in the answer filed by him the constitutionality of the act was distinctly raised. We quote:

"And also for that the court is not authorized or empowered by said act to empanel a jury to try the facts charged in the information, and so the same is unconstitutional and void."

In other words, the issue was clear cut and well defined. Was it in the power of the Legislature to deprive a citizen of Rhode Island of his constitutional right to a trial by jury?

The court was unanimous in holding, September 26, 1786, the act unconstitutional and void. The General Assembly, incensed by the decision, attempted to apply the "*Judicial Recall*," and summoned the judges to appear at its bar, "and render their reason for adjudging an act of the General Assembly to be unconstitutional and void." Three of the judges appeared and filed a manly and conclusive answer. They insisted that the "objectionable part of the act upon which the information was founded was unconstitutional—had not the force of law, and could not be executed"; that their conclusions were supported by the "most approved authorities in the law as well as by the Constitution of the Federal Union and the members thereof since the revolution in this country." They denied the right of the Legislature to remove them by summary vote, and demanded that proceedings by way of impeachment be had, based upon specific and well-defined charges.

With the filing of this protest the legislative proceedings ended, and the judges continued to discharge their duties until the expiration of their terms; the General Assembly, however, secured a partial revenge by refusing to re-elect them; and these brave and conscientious judges, who had sought to vindicate the sacred right of the American citizen to a trial by a jury of his countrymen, were punished and their places filled by more servile and pliant tools of legislative usurpation.

Judge Clarke, in referring to this case, says:

"The offending judges who were elected annually by the Legislature were dropped and the doctrine in other States met with disapproval."

Does he mean by this to *approve* and *sustain* the act of the Legislature of Rhode Island, which denied to the citizen the most sacred right guaranteed him by the Constitution?

Reference is made by Judge Cooley to a New Jersey decision holding that an act of the Legislature of that State was uncon-

stitutional and void, decided somewhere between 1780 and 1786, and expressed the opinion that it was probably the case of *Holmes v. Wallow*, unreported.

Reference is made also by S. B. Cutting in a letter to Thomas Jefferson, July 11, 1788, to a case "in Massachusetts when the Legislature trespassed upon the barrier of the Constitution, the judges of the Supreme Court solemnly determined that the statute was unconstitutional."

One of the most noted cases in which an act of the legislature of a state of the Union was declared void because contrary to the provisions of a written Constitution was *Bayard and Wife v. Singleton*, decided *May term, 1787*, by the Superior Court of North Carolina. 1 *Martin R. (N. C.) 48*. The plaintiff was represented by Mr. James Iredell (afterwards appointed one of the justices of the Supreme Court of the United States), and by Mr. W. R. Davie, a member of the Convention which framed the Constitution of the United States.

The suit was an action of ejectment, brought for the recovery of certain lands in Newberne, N. C., which the defendant held under a title derived from the State by a deed from the "Commissioner of Confiscated Estates."

An act of the General Assembly intended to quiet titles thus acquired provided that the court, in all cases where the defendant made affidavit that he had acquired title to the disputed property under a sale made by a "Commissioner of Forfeited Estates," should, on motion, dismiss the suit. Such an affidavit had been filed in the case and the motion to dismiss duly made.

The case was heard in the Superior Court of North Carolina at Newberne, November term, 1787, before Judges Ashe, Spencer and Williams. The three judges gave their opinion *seriatim*, but unanimously they held:

"By the Constitution every citizen has the right to a decision in regard to his property by a trial by jury. The Act of Assembly, therefore, of 1785 requiring the court to dismiss, on motion, the suits brought by persons whose property had been confiscated against the purchasers on affidavit of the

defendants that they were purchasers from the commissioners of confiscated property is unconstitutional and void."

We quote from the opinion of the court:

"The court, then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the Legislature and the judicial powers of the State, at length with much apparent reluctance but with great deliberation and firmness gave their opinion separately but unanimously for overruling the afore-mentioned motion for the dismissal of the said suits."

President Battle refers thus to the case in his history of the court (103 *N. C. Rep. 472*):

"These, our earliest judges, are entitled to the eminent distinction of contesting with Rhode Island the claim of being the first in the United States to decide that the courts have the power and the duty to declare an act of the Legislature which, in their opinion is unconstitutional, to be null and void. The doctrine is so familiar to us, so universally acquiesced in, that it is difficult for us to realize that when it was first mooted, the judges who had the courage to declare it were fiercely denounced as usurpers of power. * * * * The judges were eventually sustained by public opinion."

It will be noted that the conclusions of the Superior Court of North Carolina are identical with those of the Superior Court of Rhode Island in *Trevett v. Weeden*, the only difference between the cases being the Rhode Island case was decided under an unwritten constitution, while the North Carolina case was decided under a written constitution. In both cases the right of a citizen to demand trial by jury was involved. In each instance the legislative branch of the government had sought to deprive him of that right. In both cases it was held that the constitution, whether written or unwritten, was the supreme law of the land, and that the courts, federal and state, were bound to

take cognizance of it as they did of any other law and enforce its provisions.

The last case to which I shall refer in this connection is *Peter Kemper v. Henry Hawkins*, 1 Va. Cases, p. 20 to 108. This case was first considered by the General Court and adjourned by it to the District Court, that the latter might consider the question "touching the constitutionality or judicial propriety of the judges of the court carrying * * * * clauses of an act of the General Assembly into execution, which was conceived to be opposed to or in direct violation of the Constitution of the Commonwealth of Virginia."

The questions presented were most elaborately discussed and considered. Judge Roane said:

"This great question was adjourned by me from the District Court of Dumfries. I thought it necessary to obtain the opinion of this court for the government of the several district courts who might otherwise have differed in their construction of the clause in question and the administration of the law in this instance been consequently partial."

Continuing:

"I now think that the judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution, but also one which is by a plain and natural construction in opposition to the fundamental principles thereof. I consider the people of this country as the only sovereign power. I consider the legislature as not sovereign, but subordinate; they are subordinate to the great constitutional charter which the people have established as a fundamental law and which alone had given existence and authority to the legislature."

Judge Tyler, concurring, said:

"What is the Constitution but the great contract of the people, every individual whereof having sworn allegiance to

it? * * * * In the Bill of Rights many things are laid down which are reserved to the people. Trial by jury on life and death; liberty of conscience, etc. Can the legislature rightfully pass a law taking away these rights from the people? Can the judiciary pass sentence without a conviction of a citizen by twelve of his peers? * * * * In short, can one branch of the government call upon another to aid in the violation of this sacred letter? The answer to these questions must be in the negative. * * * * I concur, therefore, most heartily with my brothers who have gone before me * * * * that the law is unconstitutional and ought not to be executed."

Judge Tucker, after fully reviewing the facts and the law, said:

"From all these instances it appears to me that this deduction clearly follows, namely, that the *judiciary are bound* to take notice of the constitution *as the first law of the land*; and that whatsoever is contradictory thereto is *not* the law of the land. * * * * No legislative act, therefore, contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than the principal; that the servant is above his master; that the representatives of the people are superior to the people themselves. * * * * Nor does this conclusion by any means suppose a superiority of the judiciary to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature declared in its statute stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter rather than by the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."

It will be observed that Judge Clarke, in the quotation criticising *Marbury v. Madison*, makes no reference to the "precedents" of this country or to the decisions of the courts, state and federal; he limits his reference to "any other country."

It will also be noted that the Supreme Court of the United States had, in the three cases already quoted, asserted and exercised the identical power and authority which was asserted and exercised by the Supreme Court in *Marbury v. Madison*, and that the courts in many of the states had annulled the acts of their respective legislatures, holding them unconstitutional and void, as in *Commonwealth v. Caton* (Va. 1782), *Trevett v. Weeden* (R. I. 1786), *Bayard and Wife v. Singleton* (N. C. 1787), and others that might be cited. In other words, the law was settled, as far as it could be settled, by judicial decision, and this, years before Marshall was appointed Chief Justice, and, consequently, long before his opinion in *Marbury v. Madison*, 1803. Then why call the decision in that case "*unexpected*" and "*astonishing*"?

Washington was not a brilliant statesman or magnetic orator; he was intensely practical and knew better than any other man the then needs and the coming requirements of the young Republic, for the future of which they were legislating. He was, therefore, in the Convention of 1787 a firm and staunch supporter of the Constitution as finally adopted. From the first he urged

"A Federal government which, while preserving the rights of the states, would protect itself against foreign invasion and domestic insurrection, and enforce its laws against the individual citizen."

And to secure this he stood firmly for the "Judicial Clause," conferring upon the United States Courts jurisdiction in all cases arising under the Constitution and laws of the United States and the several states.

It was his commanding character and dominating influence which not only secured the adoption of the Constitution by the Convention, but also its subsequent ratification by the several states.

"Were it not for one great character in America so many men would not be for this government,"

said William Grayson, a member of the Convention from Virginia; and James Monroe wrote to Thomas Jefferson:

"Be assured, Washington's influence carried this government."

So fully was Washington impressed with the dignity of the Federal Judiciary and its power and influence in the scheme of government it was then proposed to establish, that, in organizing the Supreme Court, he wrote, tendering the appointment of Chief Justice to Mr. John Jay, September 8, 1789:

"I have full confidence that the love which you bear to our country and desire to promote the general happiness will not suffer you to hesitate for a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the '*keystone of our political fabric*.'"

And in announcing the appointment of Associate Justices, he wrote, September 3, 1789, that he considered

"*the judiciary system as the chief pillar upon which our national government must rest.*"

In this view Judge Clarke does not concur with Washington. He said, referring to the judiciary:

"The third department in the government which in the beginning was considered of so little influence in the government that Chief Justice Jay, of the Supreme Court of the United States, resigned to take the position of governor of New York, and the appointment to which office was declined by more than one when tendered."

He thus speaks of the Supreme Court:

"The true inside history of the methods used to change

the court in the *Income Tax* case might shock the nation if generally made known."

In further criticism of President Washington, he said:

"Which last (the judiciary) with well-framed irony was proclaimed the foundation stone of the new Republic."

Thomas Jefferson, in his famous letter to Thomas Ritchie, denounced the judiciary of the United States as

"a subtle corps of sappers and miners, working underground to undermine the foundation of our confederate fabric."

He further wrote:

"and to undermine the independent rights of the states and to consolidate all power in the hands of the government in which they have a free-hold estate."

We can but note the wide difference in the views and opinions of these two great men as to the power and influence of the judiciary of the United States upon the government then inaugurated and its probable effect upon the rights of the states and the liberties of the people. Mr. Jefferson believed the federal courts would gradually undermine our confederate fabric and the independent rights of the states, finally consolidating all power in a central government. Washington stood for the Constitution and believed the powers conferred upon the general government necessary for its purposes and that the rights reserved to the states and their citizens most ample for their protection and that the Supreme Court, as its interpreter and expounder, would equally and alike protect the rights of the government and of the states. He regarded the Supreme Court as "*the keystone of our political fabric*," or, as Ambassador Bryce puts it,

"the living voice of the Constitution—that is, of the will

of the people, expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction."

For proof let us apply the sharp test of experience and consider the tremendous events which have occurred in this country in the century and a quarter of the Constitution's existence and then determine whether the Supreme Court, in interpreting and expounding the Constitution, has saved to the states of the Union the rights guaranteed them under the Constitution and to the citizen the liberties thereby secured; or whether it has, as predicted by Mr. Jefferson, destroyed the independent rights of the states and consolidated all powers in the hands of the government.

In vindicating the wise and far-seeing statesmanship of Washington, reference need be had only to the two decades—1860 and 1880, the darkest period in our country's history. At this time the Constitution was subjected to the supreme test, including four years of civil war, in which each party insisted it was fighting for the Constitution. The North claimed it fought to preserve the Union under the Constitution, and the South insisted it fought to establish a Confederation of States under a Constitution identical in all essentials with the Constitution of the Old Union. In no sense was the Constitution an issue in that war, except in so far as it protected the rights of the South in its property in slaves.

When the end came at Appomattox and the army of General Lee, worn out by its victories, surrendered to General Grant on terms honorable alike to the victor and the vanquished, the great problem of reconstruction, so important to the country and vital to the Southern States, confronted the President and the Congress of the United States. Knowing the end was approach-

ing, President Lincoln had for many months given to it the most patient and serious consideration. His plans were well matured and his great heart, "with malice towards none and with charity for all," beat with kindness and sympathy for the people of the prostrate South.

At his last cabinet meeting only a few short hours before he was stricken down he was "most hopeful and spoke most kindly of General Lee and others of the Confederacy and the establishment of civil government in Virginia."

His plans and purposes were clearly indicated in the memorandum of agreement known as the "Johnson-Sherman Convention"; he was the one friend of the South in the North who combined the influence and courage necessary to control and direct the then political situation. His lamented death and the cruel and unspeakable manner of its accomplishment brought all his beneficent and patriotic purposes to naught; it marred the joy of the victorious North and added greatly to the sorrow and anxiety of the vanquished South. Ex-President Davis said to Colonel McClure, of Pennsylvania:

"Next to the destruction of the Confederacy, the death of Abraham Lincoln was the darkest day the South ever knew."

President Johnson, who succeeded Mr. Lincoln, did not command the confidence of the radical wing of his party and could not control its leaders, although he adopted the policy and sought to carry out in good faith the plan of reconstruction as proposed by President Lincoln. Not so the radicals; they were determined to humiliate the white people of the South and, by sweeping disfranchisement, to deny them all participation in the affairs of their state and local governments. With patriotic courage, President Johnson by a vigorous and frequent exercise of the veto power, conferred by the Constitution sought to stay the mad hand of unconstitutional vengeance. His messages returning without approval the civil rights bill and similar enactments of wrong and oppression, were masterly state papers, eloquent and unanswerable in their defence of the Constitution,

but with more than a two-thirds majority in each house against him he was powerless.

The darkest and most to be regretted chapter in the legislative history of this country is that which records the debates and enactments of the Thirty-ninth, Fortieth, and Forty-first Congresses. The President remained firm and persevered in his manly defense of the Constitution. Again and again in his veto messages he appealed to the patriotism, the judgment, and the conscience of his countrymen; his efforts were in vain; he stood alone, the one and only obstacle in the way of the radicals in their wild and venomous assault upon the liberty and property of the Southern people. The Congress, therefore, determined to be rid of him, and as this could only be accomplished by impeachment, charges were preferred and on the second attempt, February 24, 1868, the House of Representatives resolved, by a vote of 126 to 47, that

"Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors."

The radical majority in Congress absolutely dominated the government; the Federal Courts were as powerless as the President. In many of the measures adopted the right of appeal was denied. The slow processes of judicial procedure rendered it quite impossible for a test case to be made, and finally decided by the Supreme Court in time to prevent the consummation of the wrong that the Congress intended to perpetrate upon the Southern people. President Johnson's defence of the Constitution and his efforts to restore the Southern States to the Union under the Constitution as proposed by Mr. Lincoln was, in the opinion of the Congress, a high crime, and his efforts to protect the Southern people from insult and outrage a high misdemeanor.

The trial, the most important in the history of the country, began March 31, 1868, with Chief Justice Chase presiding. Mr. Benj. F. Wade, a Senator from Ohio, was President of that body, and would have succeeded to the Presidency of the United States had Mr. Johnson been convicted, but he "laid his stricken conscience on the altar of his country," and was sworn as a juror.

Had a single one of the Senators voting not guilty been induced by the almost irresistible pressure brought to bear upon the Republicans changed his vote, Benjamin F. Wade would, *by his own vote*, have become President of the United States. These men preferred to obey their oaths and to follow their convictions rather than yield to the demands of their party. This is referred to only to indicate the character and temper of the majority and their determination to resort to any means to wreck vengeance upon the white people of the South.

The vote was taken May 26th on Article XI, which charged that the President, in declaring that the Thirty-ninth Congress was not a legal congress, committed a high misdemeanor. He was acquitted by a vote of thirty-five (including Wade, of Ohio), "guilty" and nineteen "not guilty"—not the necessary two-thirds.

Here we have a striking illustration of the sometime tyranny of the majority in the pressure brought to bear upon some of the republican senators who refused to obey the party leaders. This partisan pressure was without precedent in the history of free government. To illustrate:

The General Conference of the Methodist Episcopal Church, in session in Chicago, May 14, 1868, with nine bishops and two hundred and forty-nine delegates present, representing, as they claimed, one million one hundred thousand members, unanimously voted,

"to appoint an hour of prayer, from nine to ten A. M. tomorrow to invoke, humbly and earnestly, the mercy of God upon our nation and beseech Him to save our Senators from error and so influence them that their decree shall be in truth and righteousness."

This was at once wired to Washington, and on the same day the Conference of the African Methodist Episcopal Church, assembled in that city, passed a similar resolution; but, as it was said, "employed no pious circumlocution;" they addressed their prayer for the conviction of the President—not to the Deity, but directly to the Senate.

This was a distinct effort to introduce at that time the much talked of political heresy of "*Recall*," but it failed. Senator Fessenden, of Maine, who succeeded Mr. Chase in the cabinet of President Lincoln, met and denounced the effort to overawe and intimidate. I commend his noble and inspiring words to all those who would yield to the clamor of an excited and inflamed public, rather than obey the demands of duty and the promptings of conscience. Mr. Fessenden said:

"To the suggestion that popular opinion demands the conviction of the President * * * I reply that he is not on trial before the people, but before the Senate. * * * The people have not heard the evidence as we have heard it; they have not taken an oath to do impartial justice according to the Constitution and the laws; I have taken that oath. I can not render judgment upon their conviction, nor can they transfer to themselves my punishment if I violate my oath. I should consider myself undeserving of the confidence of that just and intelligent people who impose upon me the great responsibility, and unworthy of a place among honorable men if, for fear of any public reprobation, or for the sake of securing popular favor, I should disregard the convictions of my judgment and conscience. The consequences which may follow from conviction or acquittal are not for me, with my conviction, to consider; the future is in the hands of Him who made and governs the universe, and the fear that He may not govern well will not excuse me for a violation of His laws."

After his acquittal, President Johnson continued firm in his position until the end of his term, and declined to approve the vicious reconstruction measures adopted by the Congress, but this availed nothing.

General Grant, who succeeded President Johnson, March 4, 1869, quickly allied himself with the radicals and while President not only approved, but encouraged the policy of vengeful and vindictive legislation.

The radicals in Congress had two theories as to the status of the lately seceded states; one was represented in the Upper

House by Charles Sumner, the accomplished Senator from Massachusetts, and the other in the Lower House by the social outcast and moral leper, Thaddeus Stevens, of Pennsylvania.

Senator Sumner advanced his famous theory of "*State Suicide*," insisting that the lately seceded states were no longer states under the Constitution. In other words, that these states were obliterated from the map of the Union; that the territory of the extinct states belonged to the United States, and was to be governed and controlled as other territory subject to the exclusive jurisdiction of Congress.

Mr. Stevens contended that these States were *conquered provinces*, non-existent States; he called them "dead carcasses lying within the Union," and held that "the lives, the liberty and the property of all the South were, by virtue of conquest, at the absolute disposal of the government. The principles of international law might guide the settlement if the government chose, but no provisions of the domestic constitution had any binding force whatever."

While the Congress was deliberating upon and discussing these and the various other plans of reconstruction proposed, the states of the South were given over to the most corrupt and ignorant of their population, sustained by the military power of the government.

Under the act of March 2, 1867, ten states of the Union were divided into five military districts, each commanded by an officer not below the rank of brigadier-general. Virginia, the oldest of the thirteen, was Military District No. 1, Major-General J. M. Schofield, commanding.

By other acts Congress undertook to fix, and did fix, as far as it was possible, the qualification of voters, not only for the purpose of reconstruction, but for the future political control of the states.

Another act, entitled "An Act to protect all citizens in their civil and legal rights," provided that,

"All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, privileges, etc., of inns, public conveyances on

land and water, theatres, etc., subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition or servitude."

Heavy penalties were prescribed for violations of this act.

The protecting agis of the Constitution was absolutely taken from the white men of the South, and the only law to which they could appeal for protection was the will of the military commander. The negroes, just released from slavery, were enfranchised and thoroughly organized against the white people of the South by the officials of the "Freedman's Bureau" as the "Wards of the Nation." These were aided by the "carpet-bagger," an exotic, and the "scalawag," a native parasite. It was under these conditions and by these people that the state and local government in most of the Southern States were to be reorganized and re-established.

"A period of darkness (writes Dr. Burgess, Professor of Constitutional Law, etc., Columbia University, New York), now settled down upon these unhappy communities, blacker and more helpless than the worse experience of the war. The conduct of the men who now appeared upon the scene as the creators of the new South were so tyrannic, corrupt, mean and vulgar as to repel the historian from attempting any detailed account of their doings and incline him to vaguest outline.

"It was the most soul-sickening spectacle that Americans had ever before been called upon to behold. Every principle of the old American policy had been reversed. In place of government by the most intelligent and virtuous part of the people for the benefit of the governed, here was government by the most ignorant and vicious part of the population for the benefit—the vulgar materialistic, brutal benefit—of the governing set. * * * It is best for the North, best for the South, best for the whole country, and best for the world, that this terrible mistake of the North and this terrible

degradation of the South should be dealt with briefly and impersonally."

It was at this time and with these conditions prevailing that the bronze statue of Chief Justice Marshall, executed by Randolph Rogers, reached Richmond. It was quietly placed in position on the monument in the Capitol Square, one of the six eminent Virginians grouped around Crawford's magnificent equestrian statue of Washington. It was indeed a singular coincidence that the effigy of the great Chief Justice, "who found the Constitution paper and made it power, who found a skeleton and clothed it with flesh and blood," should have arrived in Virginia, his mother state, at this supreme crisis in its history, when that Constitution was suspended and the civil law utterly powerless to protect the citizen.

This incident was the occasion for certain verses by that brilliant Virginian and gifted poet, the late Innes Randolph, in which, treating existing conditions with becoming solemnity and dignity, but with scathing irony and rare humor, he wrote:

"We are glad to see you, John Marshall, my boy,
So fresh from the chisel of Rogers;
Go, take your stand on the monument there,
Along with the other old codgers:
With Washington, Jefferson, Henry and such,
Who sinned with a great transgression,
In their old-fashioned notions of freedom and right,
And their hatred of wrong and oppression.
You come rather late to your pedestal, John,
For sooner you ought to have been here;
For the volume you hold is no longer the law,
And this is no longer Virginia.
The old Marshall-law you expounded of yore
Is now not at all to the purpose,
And the martial law of the new Brigadier
Is stronger than habeas corpus.
So keep you the volume shut with care,
For the days of the law are over,
And it needs all your brass to be holding it there
With "Justice" inscribed on the cover.
Could life awaken the limb of bronze

And blaze in the burnished eye,
What would ye do with your movement of life,
Ye men of the days gone by?
Would you hide us or pity us, blush or weep,
Ye men of the days gone by?
Would Jefferson tear up the scroll he holds,
That time has proven a lie?
And Marshall shut the volume of law,
And lay it down with a sigh?
Would Mason roll up the Bill of Rights
From a race unworthy to scan it?
And Henry dash down the eloquent sword
And clang it against the granite?
And Washington, seated in massy strength
On the charger that paws the air,
Could he see his sons in their deep disgrace,
Would he ride so proudly there?
He would get him down from his big brass horse,
And cover his face at our shame,
For the land of his birth is now "District One",
Virginia was once the name!

I have said that the courts, during this period, were practically powerless because of the delay incident to judicial proceedings in cases to be finally determined by the Supreme Court. This condition, although so disastrous to the South, was but temporary. When at last reached, on appeal, "the sleeping lion of the Constitution" uttered no uncertain sound. The Court proclaimed in language not to be misunderstood that "*The Constitution was a law for the rulers as well as for the people equally in peace and in war.*"

It was not until 1865, that the Supreme Court was called upon to consider and decide any great constitutional question growing out of the Civil War and the reconstruction legislation of the Congress.

In October, 1864, L. P. Milligan, a citizen of Indiana, and a member of its bar, was arrested by the military authorities, charged with treason in criticising the National Government in a political speech made at Fort Wayne, tried by a military commission in Indianapolis, Major-General Hovey presiding, convicted and sentenced to be executed, May 19, 1865. Early in

that month a writ of *habeas corpus* was issued, the necessary proceedings followed, and the case finally reached the Supreme Court. This was a case of tremendous importance; the Constitution was on trial, the ablest lawyers of the country were retained and conducted the case with masterly ability.

Judge Jeremiah Black, for the petitioner, the recognized leader of the American bar, made his wonderful argument in defense of the "right to a trial by jury," closing with this solemn appeal to the court:

"You can save us from this horrible fate. You alone can deliver us from the body of this death. To that fearful extent is the destiny of this Nation in your hands."

The decision of the court was worthy of that august body and vindicated the wisdom of those who, together with Washington had conferred upon it jurisdiction in all constitutional questions.

The noble words of Mr. Justice Davis, who had been recently appointed to the Supreme Bench by President Lincoln, added new lustre to the court and inspired with renewed vigor the lovers of civil liberty and constitutional government. The decision was the first rift in the dark cloud that had for so long a time overhung the national horizon. It demonstrated to the people that the judges of the Supreme Court were unawed by popular clamor and fearless in resisting the Congress in its mad assaults upon personal rights and individual liberty. The judges were loyal to the Constitution and faithful to the oath taken by them to support and protect it, and this regardless of the wild passions and prejudices of the hour. Mr. Justice Davis said:

"No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people. * * * * *

"The Constitution of the United States is a law for rulers and people equally in war and peace, and covers, with the shield of its protection, all classes of men at all times and under

all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence." 4 Wall. 2.

Milligan was promptly discharged from custody. Thaddeus Stevens thus denounced this decision:

"Scarcely less infamous than that in the Dred Scott case, as much more dangerous to liberty."

The first case involving the validity of any of the several acts of Congress enacted during the Civil War imposing pains and penalty upon the Southern people for participating therein was "*ex-parte Garland*," December, 1866, 4 Wall, U. S. 333. Under the act of July 2, 1862, attorneys of the courts of the United States, before being allowed to practice at the bar of the Supreme Court, were required to take and subscribe an oath that they had voluntarily given no aid, comfort, etc., to persons engaged in armed hostilities to the United States; in other words, the "Test Oath." The act was declared unconstitutional and void.

A similar decision was reached by the Supreme Court in *Cummings v. State of Missouri*, 4 Wall, U. S. 278. It was there held that a clause in the Missouri Constitution which required all priests, clergymen, etc., to take the same oath before being permitted to exercise the functions of the ministry, etc., was unconstitutional and void.

The most far-reaching and important decision of the Supreme Court in the matter of reconstruction legislation, the one which infused hope into the hearts of the Southern people and, as a matter of fact, *saved to them their civilization*, was that in the several prosecutions known as the "Civil Rights Cases," involv-

ing the validity of the act hereinbefore quoted. The Supreme Court held, Justice Bradley delivering the opinion, that:

"Said sections are unconstitutional and that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendments of the Constitution; and no other grounds of authority being suggested, it must necessarily be declared void, at least so far as operation in the several States is concerned." 109 U.S. 3.

In *Texas v. White*, 7 Wall, U. S. 725, it was declared, Chief Justice Chase speaking for the court:

"Not only therefore can there be no loss of separate and independent autonomy to the states through their union under the Constitution, but it may not be unreasonably said that the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution in all its provisions looks to an *indestructible union, composed of indestructible states.*"

The Chief Justice continues (referring to the State of Texas):

"The union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states. * * * * *

"Considered, therefore as transactions under the Constitution, the ordinance of secession adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance were absolutely null. They were utterly without operation in law. The obligation of the State, as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired."

Referring to this decision, Chief Justice Chase could, with great propriety, have appropriated the language of Chancellor Wythe in *Commonwealth v. Caton* and said: When the whole Congress attempted to overleap the bounds prescribed to it by the people in administering the public justice of the country, I met their united power at my seat in this august tribunal, and pointing to the Constitution said to them, here is the limit of your authority; and, hither, shall you go, but no further. As the Union is indissoluble, so are the States indestructible.

This decision completely disposed of and utterly destroyed Senator Sumner's theory of "State Suicide," and Mr. Stevens' claim of "Conquered Provinces."

So sweeping were the decisions of the Supreme Court in the whole matter of reconstruction that Judge Hoar, at the time of his lamented death perhaps the ablest member of the United States Senate, in his memorable address before this body in 1898, which so many of us recall, said:

"I have spoken in behalf of a tribunal whose constitutional judgment upon the greatest question with which it has ever had to deal has overthrown, baffled and brought to naught the policy in regard to the great matter of reconstruction of the party to which I myself belong and the school of politics in which I have been trained and which I suppose was also that of a majority of the American people."

These decisions, we submit, are conclusive. The Supreme Court of the United States "is the final arbiter in all questions arising under the Constitution," and this not only because, as we have seen, it was so intended by the framers of the Constitution, by the Convention which adopted it, and the states which afterwards ratified it; but also because the courts, state and federal, which were called at that time to pass upon the question so decided.

In *Marbury v. Madison* the Supreme Court of the United States only followed, as we have said, in the path already blazed for it, and happily for the country, and especially for the Southern States, it has since steadily and consistently followed that

path and vindicated the wisdom of Washington and his co-patriots in insisting that the Supreme Court "be the great moral substitute for force in controversies between the People, the States, and the Union." It has been well said "that a noble judiciary, under a great Chief Justice, by taking righteous advantage of the ample provisions of the Constitution, has expanded the form of the government to its proper proportions and filled its veins with the life-blood of a real nationality."

If Washington, Marshall, Madison and those who so nobly battled for the judiciary clause in the Constitution had yielded to the demands of Mr. Jefferson and those who agreed with him, the Supreme Court would not have had jurisdiction and could not have considered or passed upon the constitutionality of the "Force Bill," the "Civil Rights Bill" and other kindred measures of confiscation, disfranchisement, humiliation and oppression, and those acts would have become the law of the land.

The same comprehensive grasp and understanding of the then present needs of the young Republic, so clearly evidenced by Washington both in the Constitutional Convention and the period which followed preceding the organization of the government, together with his eight years in the Presidency, enabled him to anticipate its future requirements and dangers and to advise and warn his countrymen in regard to them.

This is clearly evidenced in his immortal "Farewell Address"—the priceless legacy of the "Father of his Country" to his children and to their children for generations yet to come. He saw, with his wonderful prescience, conditions as they today exist in this country and the dangers which threaten and the difficulties which environ our institutions.

He suggested and pointed out the path of safety. He enjoined obedience to the Constitution as "sacredly obligatory upon all." He wrote:

"The very idea of the power and rights of the people to establish government presupposes the duty of every individual to obey the established government."

He insists that

"All obstructions to the execution of the laws—all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract or awe the regular deliberation and action of the constituted authorities * * * * are of a fatal tendency,"

and but serve to substitute for the will of the nation the will of "a small but artful and enterprising minority of the community."

To Washington the combination of wealth for illegal or unpatriotic purposes was as hateful as the combination of misguided and misdirected poverty. To him capital used for inhuman or oppressive purposes and not for legitimate and beneficial uses and the development of the country was as abhorrent as was the commune which seeks to pull down and to destroy. All such combinations he regarded as subversive of the rights of the people, as in the course of time, no matter how originally intended, they would become

"potent engines by which cunning, ambitious and unprincipled men will be enabled to subvert the powers of the people and to usurp for themselves the reins of government."

He pleads for the preservation of the Constitution in its integrity and begs that we "resist with care the spirit of innovation upon its principles, however specious the pretext."

We have today a propaganda pledged to agitation, and seeking, without regard to methods, to impress upon the masses that the Constitution of the fathers has become obsolete; that it is unsuited to modern conditions, and that the Supreme Court stand in the way of so-called "*Progress*." These people—the followers of new and strange gods and the advocates of startling innovations and doctrines—insist that the Constitution can best be interpreted and the rights of the people better protected by the ballots of the electorate than by judges educated and courts established for that purpose; these agitators are disturbers of the public peace and the enemies of a constitutional democracy.

If the individual citizen is to be protected in his property and other rights, their efforts to overthrow and destroy existing conditions must be firmly and steadily opposed; the obligation to do this and the responsibility for results rests largely with the members of the Virginia Bar. It is our duty to resent, resist and refute by intelligent and determined but conservative efforts and convincing arguments these assaults upon the Constitution and the laws, no matter by whom made, or for what real purposes intended.

Washington no doubt saw with his prophetic eye and had in mind the malign influence of the demagogue and the maker of "issues" when he so earnestly and emphatically warned us to beware of "*the impostures of pretended patriotism*."

I have invoked the great name, the sane teachings and the patriotic example of Washington with the hope of contributing something to this result. I appeal to you because, as Judge Keith so well expressed it:

"To lawyers, above all men, the memory and example of Washington should be dear. The ruling principle of his character was love of order throughout life, from youth to age—in all things, small and great, it was the dominant force which shaped and controlled his life. * * * * Following the injunction of the great apostle, he 'proved all things and held fast so that which was good,' and in this time of some real and much self-proclaimed progress it would be well for us, too, to recall the mandate of St. Paul and, proving all things, hold fast to that which is good."

I would ask that you kindly pause for one moment and reflect as to the conditions which would have prevailed and the consequences which would have followed, especially in the Southern States, if the Supreme Court had not had jurisdiction in all matters of reconstruction legislation or had its decisions in this connection been less conservative or less in strict conformity to the Constitution.

The reconstruction measures of the Congress met with the approval of an overwhelming majority of the Northern people.

The Supreme Court was bitterly denounced for thwarting the popular will.

In referring to the decision in the *Milligan* case, General Jno. A. Bingham, a leading member of Congress from Ohio, and one of the most active managers in the impeachment of President Johnson, said:

"Let us sweep at once every appellate jurisdiction in all cases if the court, by virtue of its original jurisdiction, usurps the power to decide political cases and defy a free people's will."

If the "*Recall of Judges*" had then been permissible, an infuriated and disappointed majority would have removed Chief Justice Chase and his associates concurring with him, and the independence of the judiciary, or, in fact, the Constitution itself would have been destroyed and (appropriating the idea of another) the star which glitters to Virginia's name in the blue of our country's flag would have been removed, but the stripe would have remained, fit emblem of her degradation.

It must be conceded by all that the Supreme Court of the United States preserved the Union under the Constitution and restored to the States of the South their sovereignty and the right of home rule and local self-government.

My brothers of the Virginia bar, let us stand by and sustain the courts, both federal and state, in their every effort to maintain and defend the Constitution and enforce the laws made in pursuance thereof. Let us see that our judges are learned in the law, fearless, incorruptible and independent, with, as Chief Justice Marshall said, "nothing to control them but God and their own conscience." Let us charge them as the judges of Israel were charged more than three thousand five hundred years ago by the first great Lawgiver:

"* * * Hear the *causes* between your brethren and judge righteously between *every* man and his brother and the stranger *that is* with him.

"Ye shall not respect persons in judgment, *but* ye shall hear the small as well as the great. Ye shall not be afraid of the face of man; for the judgment *is* God's."

—Deut. 1:16-17.

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**END OF
TITLE**